

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Criminal Justice Committee

BILL: CS/SB 806

INTRODUCER: Commerce Committee and Senator Constantine

SUBJECT: Novelty lighters

DATE: March 31, 2009 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Cooper	CM	Fav/CS
2.	Erickson	Cannon	CJ	Pre-Meeting
3.	_____	_____	JA	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This CS prohibits the sale, donation, or distribution of novelty lighters to anyone in Florida. A “novelty lighter” is defined as a mechanical device that uses flammable gas or liquid or electrical current, and resembles items that typically appeal to children 10 years of age or younger.

This CS does not apply to lighters manufactured before January 1, 1980.

This CS makes a first violation of the novelty lighter offense a second degree misdemeanor; a second or subsequent violation is a first degree misdemeanor.

This CS creates an undesignated section of the Florida Statutes.

II. Present Situation:

According to the U.S. Consumer Product Safety Commission, children under 5 years of age playing with lighters cause more than 5,000 residential fires a year, resulting in approximately

150 deaths and more than 1,000 injuries.¹ For fires that were started unintentionally by children as child-play, 84 percent involved children under the age of 10.² In the past, there has been little research as to how dangerous novelty lighters are compared to other lighters because research usually combines novelty lighters into a broader category of lighters.³ Upon realizing a need for data as to the dangerousness of novelty lighters, the U.S. Fire Administration's National Fire Incident Reporting System started collecting information specifically about novelty or toylike lighters on January 1, 2008.⁴ Although there is a lack of specific data concerning children's use of novelty lighters, there are several documented instances of children causing dangerous fires because they were playing with lighters that look like, or operate like, toys.⁵

The federal Consumer Product Safety Commission currently regulates the safety of domestic and imported lighters and requires that all disposable and novelty lighters be child resistant under 16 C.F.R. §1210.⁶ "Novelty lighter" is defined under 16 C.F.R. §1210.2(d), as a "lighter that has entertaining audio or visual effects, or that depicts (logos, decals, art work, etc.) or resembles in physical form or function articles commonly recognized as appealing to or intended for use by children under 5 years of age." The definition includes "lighters that depict or resemble cartoon characters, toys, guns, watches, musical instruments, vehicles, toy animals, food or beverages, or that play musical notes or have flashing lights or other entertaining features."⁷

The U.S. Senate has considered banning novelty lighters that appeal to children under the proposed "Protect Children from Dangerous Lighters Act" (S. 3375) introduced in the Senate on July 31, 2008.⁸

There has been a recent movement by states to pass legislation concerning novelty lighters.⁹ Maine, Tennessee, Oregon, and Arkansas have recently passed laws prohibiting the sale or distribution of novelty lighters.¹⁰ Several other states have considered, or are presently considering, banning novelty lighters, including Arizona, Hawaii, Illinois, Iowa, Kansas, Michigan, Missouri, New Jersey, New York, Texas, Vermont, Virginia, and Washington.¹¹

III. Effect of Proposed Changes:

Section 1 creates an undesignated section of the Florida Statutes to prohibit the sale, donation, or distribution of novelty lighters to anyone in Florida.

This CS defines "novelty lighter" as a mechanical device that uses flammable gas or liquid, or electrical current, and resembles items that typically appeal to children 10 years of age or

¹ See <http://www.cpsc.gov/cpsc/pub/pubs/5021.html>.

² See http://www.usfa.dhs.gov/downloads/pdf/publications/fa_307.pdf.

³ See <http://mondoglobo.wftk.org/blog/qa/2009/01/banning-novelty-lighters.html>.

⁴ See http://www.usfa.dhs.gov/fireservice/subjects/arson/arson_awareness.shtm.

⁵ See *Id.* for a description of child fire-setting instances.

⁶ See <http://classaction.findlaw.com/recall/cpsc/files/1993jun/93080.html> and <http://www.cpsc.gov/businfo/importsafety.pdf>

⁷ See 16 C.F.R. §1210.2(d).

⁸ See http://www.nvfc.org/Novelty_Lighter_Legislation.

⁹ See http://www.usfa.dhs.gov/fireservice/subjects/arson/arson_awareness.shtm.

¹⁰ See 25 M.R.S.A. §2467, T.C.A. §47-18-129, <http://arkansasnews.com/2009/03/10/ban-on-novelty-on-lighters-signed-into-law/> and <http://www.msnbc.msn.com/id/29356009/>.

¹¹ See http://www.nvfc.org/Novelty_Lighter_Legislation.

younger. The CS describes the characteristics of banned lighters to include lighters that resemble cartoon characters, animals, toys, guns, watches, musical instruments, vehicles, food, or beverages. The CS also bans lighters that make sound or music, display flashing lights, or have other visual effects.

This CS allows for the sale, donation, or distribution of lighters manufactured before January 1, 1980.

This CS makes a first violation of the novelty lighter offense a second degree misdemeanor;¹² a second or subsequent violation is a first degree misdemeanor.¹³

Section 2 provides an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

If enacted into law, this CS may be susceptible to legal challenges under two general constitutional provisions.

Supremacy Clause

To the extent that this law is inconsistent with federal regulations relating to lighters, it could be challenged under the Supremacy Clause of the U.S. Constitution.

The Supremacy Clause of the Constitution under art. VI, cl. 2, provides that the laws of the United States “shall be the supreme Law of the Land...” Federal law supersedes state law when Congress expressly preempts state law or establishes a comprehensive regulatory scheme over an area, removing the entire field from state regulation.¹⁴

¹² A second degree misdemeanor is generally punishable under ss. 775.082 and 775.083, F.S., by incarceration in a county jail not exceeding 60 days, a \$1,000 fine, or both.

¹³ A first degree misdemeanor is generally punishable under ss. 775.082 and 775.083, F.S., by incarceration in a county jail not exceeding 1 year, a \$1,000 fine, or both.

¹⁴ *Colon v. Bic U.S.A., Inc.*, 136 F.Supp.2d 196, 201 (S.D.N.Y. 2000)(citing *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)).

Preemption also occurs when state law directly conflicts with federal law or interferes with the achievement of federal objectives.¹⁵

Generally, there is a presumption against the preemption of state laws.¹⁶ Courts will interpret a preemption clause narrowly to avoid encroachment upon the authority of the states, especially in areas of health and safety, under which states have traditionally been within their police powers.¹⁷

However, an express preemption claim may be made because the U.S. Consumer Product Safety Commission (CPSC), which was established to examine methods of protecting consumers against unreasonable risks of injury from household products, regulates safety standards for disposable and novelty lighters.¹⁸ 16 C.F.R. § 1145.17, expressly gives the CPSC regulatory authority under the Consumer Product Safety Act (CPSA) to regulate multi-purpose lighters that can be operated by young children. Specifically, 16 C.F.R. § 1210.1-5, prescribes standards for novelty lighters to ensure that lighters are “resistant to successful operation by children younger than 5 years of age.”

The CPSA contains a preemption clause which states,

[w]henever a consumer product safety standard under this chapter is in effect and applies to a risk of injury associated with a consumer product, no State or political subdivision of a State shall have any authority either to establish or to continue in effect any provision of a safety standard or regulation which prescribes any requirements as to the performance, composition, contents, design, finish, construction, packaging, or labeling of such product which are designed to deal with the same risk of injury associated with such consumer product, unless such requirements are identical to the requirements of the Federal standard.¹⁹

If the regulation of sale of novelty lighters is construed as a “regulation” as defined under CPSA, the proposed state regulation would likely be deemed more restrictive than federal regulations, and therefore preempted, not only because some novelty lighters would be banned from sale, but also because this CS expands the regulation to include lighters that appeal to children 10 years of age or younger, as opposed to federal law that regulates novelty lighters that appeal to children under 5 years of age.

However, a state may, under 15 U.S.C. 2075(c), seek an exemption from preemption from the CPSC by demonstrating that the state requirement provides a “significantly higher degree of protection” from the risk of injury than the federal requirement and that the state requirement does not “unduly burden interstate commerce.”²⁰ A state does not

¹⁵ *Id.* at 201.

¹⁶ See 14 A.L.R. Fed. 2d 501.

¹⁷ See 14 A.L.R. Fed. 2d 501, §3.

¹⁸ See *Colon v. Bic U.S.A., Inc.* at 201 and 16 C.F.R. § 1210.1, § 1210.2, § 1145.17.

¹⁹ 15 U.S.C. § 2075(a).

²⁰ See 14 A.L.R. Fed. 2d 501 for an explanation of the state exemption available under 15 U.S.C. 2075(c). See 16 C.F.R. §§ 1061.1-12 for exemption application requirements.

have standing to seek an exemption until a state demonstrates to the CPSC that the state requirement has been enacted.²¹

An implied preemption claim can be made alleging that the federal government exclusively occupies the field of regulation concerning the safety of novelty lighters because several federal laws exist that concern the safety of lighters generally, and the safety of lighters that appeal to children.²² Furthermore, an implied preemption claim may be made claiming that the proposed state regulation conflicts with the purpose of the federal regulation.²³

In light of the aforementioned preemption concerns, staff contacted the U.S. Consumer Product Safety Commission (CPSC) to gain its perspective on whether federal law would preempt this law, should it be enacted. The CPSC has replied stating, “the law would be preempted under section 26(a) of the Consumer Product Safety Act (CPSA) unless an application for exemption from preemption under section 26(c) of the CPSA was granted.”²⁴ The CPSC further explained that the provision under section 26(b), stating that a state may establish a more stringent requirement “for its own use,” “does not apply to requirements, such as those in the CS, that apply generally to the residents of the State.”²⁵

Commerce Clause

To the extent that this law is inconsistent with the Dormant Commerce Clause of the U.S. Constitution, it is subject to challenge.

The U.S. Supreme Court has interpreted that because there is an express provision in the U.S. Constitution under art. I § 8, cl. 3, granting Congress the authority to regulate commerce among the states, it also implicitly restricts the power of the states to affect commerce, creating a “Dormant Commerce Clause.”²⁶

Under the Dormant Commerce Clause, if a state regulates commerce so that it does not discriminate against another state, the statute carries out a legitimate local public interest, and the statute only has an incidental effect on interstate commerce, the regulation will be upheld, unless the burden imposed on commerce is clearly excessive in relation to the benefits the statute promotes.²⁷ Essentially, the courts conduct a balancing test and consider (1) the extent of the burden on interstate commerce, (2) the legitimacy of the state’s interests involved, and (3) whether reasonable, non-discriminatory alternatives are available to address the state’s interests.²⁸

²¹ See 16 C.F.R. § 1061.4(a)(1).

²² For example, see 16 C.F.R. §§ 1145.16-17 and §§1210.1-20. See also, *Colon v. Bic U.S.A., Inc.*, 136 F.Supp.2d 196, 201 (S.D.N.Y. 2000)(on the definition of implied preemption).

²³ See *Frith v. Bic Corp.*, 863 So. 2d 960, 967 (Miss. 2004).

²⁴ The Consumer Product Safety Commission’s email response to staff’s preemption inquiry is on file with the Commerce Committee. (email received March 13, 2009)

²⁵ *Id.*

²⁶ *Alliant Energy Corporation v. Bie*, 330 F.3d 904 (7th Cir. 2003).

²⁷ *Pike v. Bruce Church, Inc.*, 397 U.S. 137,142 (1970).

²⁸ *Id.*

Should the courts find the law meets this balancing test, it is likely to be upheld.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Because manufacturers and retailers will not be able to sell novelty lighters to people in Florida, they will be financially impacted. Furthermore, anyone who sells, donates, or distributes novelty lighters may be criminally penalized. The CS may affect existing contracts between retailers, manufacturers, and distributors.

C. Government Sector Impact:

The bill creates a new second degree misdemeanor and a new first degree misdemeanor offense. To the extent that the State Attorney's Office enforces the provisions of this law, there will be attendant costs of this enforcement. The impact, if any, of the bill's penalty provisions on county jails is indeterminable. While the Criminal Justice Impact Conference (CJIC) provides the official estimate of the prison bed impact, if any, of legislation that involves felony penalties, there is no entity similar to CJIC that estimates the impact on county jails of legislation that involves misdemeanor penalties.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Commerce Committee on March 17, 2009:

The CS deletes from the bill an exemption from the sales restriction for lighters considered to be "collectables."

B. Amendments:

None.